

ESTTA Tracking number: **ESTTA87233**

Filing date: **06/27/2006**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

## Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

### Opposer Information

Name	Cadbury Beverages B.V.
Granted to Date of previous extension	07/05/2006
Address	World Trade Center, Tower B 17th floorStrawinskylaan 1725 1077 XX Amsterdam, NETHERLANDS
Attorney information	Barbara A. Solomon, Esq. Fross Zelnick Lehrman & Zissu, P.C. 866 United Nations Plaza New York, NY 10017 UNITED STATES bsolomon@frosszelnick.com Phone:212-813-5900

### Applicant Information

Application No	76636421	Publication date	03/07/2006
Opposition Filing Date	06/27/2006	Opposition Period Ends	07/05/2006
Applicant	EZAKI GLICO KABUSHIKI KAISHA 6-5, Utajima, 4-Chome Nishiyodogawaku, Osaka, JAPAN		

### Goods/Services Affected by Opposition

Class 030. All goods and sevicees in the class are opposed, namely: biscuit sticks
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Attachments	Notice of Opposition.pdf ( 7 pages )(168591 bytes )
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Signature	/s/
Name	Barbara A. Solomon, Esq.
Date	06/27/2006

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial No. 76/636,421

Mark: CRUSH

Filed: April 19, 2005

Published in the *Official Gazette* on March 7, 2006

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DR PEPPER/SEVEN UP, INC.,	:	
	:	
Opposer,	:	
	:	
- against -	:	NOTICE OF OPPOSITION
	:	
EZAKI GLICO KABUSHIKI KAISHA, d/b/a	:	
EZAKI GLICO COMPANY, LIMITED,	:	
	:	
Applicant.	:	
-----X	:	

Commissioner for Trademarks  
P.O. Box 1451  
Alexandria, VA 22313-1451

BOX TTAB - FEE

Opposer, Dr Pepper/Seven Up, Inc. ("Opposer"), a company organized and existing under the laws of the State of Delaware, with its principal place of business at 5301 Legacy Drive, Plano, Texas 75024, believes that it would be damaged by the issuance of a registration of the trademark CRUSH, applied for in intent-to-use application Serial No. 76/636,421 for "biscuit sticks" in International Class 30 and therefore opposes the same. As grounds for the opposition, Opposer, by its attorneys Fross Zelnick Lehrman & Zissu, P.C., alleges as follows:

1. Since at least as early as 1916 and continuing through the present, Opposer, through its predecessors in interest, has used the marks ORANGE CRUSH and CRUSH (collectively, the “CRUSH Marks”) for beverage products.

2. CRUSH brand beverages are sold in convenience stores, delis, supermarkets, mass merchandisers, wholesale clubs and gas stations throughout the United States. Millions of bottles and cans of CRUSH-branded beverages have been distributed in the United States with sales in the millions of dollars. Opposer and its predecessors-in-interest have been using the CRUSH Marks on beverages continuously for a period commencing long prior to any date on which Applicant can rely up to the current date.

3. Due to the extreme popularity of CRUSH-branded products, there have been significant opportunities for Opposer to expand its use of the CRUSH Marks. In addition to using the CRUSH mark in connection with beverages, Opposer uses the CRUSH mark on candy and confectionery which products are sold nationwide. Further, Opposer has licensed the CRUSH mark for use in connection with flavored lip balm, vitamin C drops and clothing. Opposer’s use of the CRUSH Marks on such goods predates the application filing date.

4. Recently, Opposer licensed its CRUSH mark for use in connection with frozen novelties, including ice pops, ice cream cones and related goods.

5. Opposer is the owner by assignments recorded in May, 2006 of numerous U.S. trademark registrations for the CRUSH Marks including, but not limited to:

<b><i>Mark</i></b>	<b><i>Reg’n No.</i></b>	<b><i>First Use Date</i></b>	<b><i>Class and Goods</i></b>
CRUSH	2,895,772	October 31, 1999	IC 30: confectionery, namely candy
CRUSH and Design	2,418,266	June 1, 1999	IC 32: soft drinks and concentrates for making the same

CRUSH (Stylized)	2,418,265	June 1, 1999	IC 32: soft drinks and concentrates for making the same
ORANGE CRUSH	683,361	June 15, 1926	IC 32: non-alcoholic, maltless orange-flavored beverages and concentrates and compounds for making the same
CRUSH	187,791	1915	IC 32: non-alcoholic, maltless beverages and concentrates and compounds for making the same

All of the registrations set forth above are valid, subsisting and in full force and effect, all serve as prima facie evidence of Opposer's exclusive rights in and to the registered marks, all establish that Opposer's rights in the CRUSH Marks are long-prior to any rights on which Applicant can rely, and all serve to place Applicant on notice of Opposer's rights. In addition, U.S. Registration No. 683,361 is incontestable and as such constitutes conclusive evidence of Opposer's exclusive right to use the CRUSH mark on the goods specified therein pursuant to Sections 7 and 33 of the Lanham Act, 15 U.S.C. §1057, 115(b).

6. Through the years of use and advertising of CRUSH and as a result of the expenditure of significant resources by Opposer and its predecessors to promote CRUSH products, Opposer through its predecessors has established strong common law rights in the CRUSH Marks in addition to its rights flowing from its federal registrations. The CRUSH Marks have come to be associated uniquely with Opposer, represent enormous goodwill of Opposer and identify and distinguish goods manufactured, approved of or licensed by Opposer from those of others.

7. As a result of the long use, registration and renown of the CRUSH Marks, Opposer's CRUSH Marks are entitled to an extremely broad scope of protection.

8. Upon information and belief, Applicant is a Japanese corporation located and doing business in Osaka, Japan.

9. On or about April 19, 2005 Applicant filed intent-to-use application Serial No. 76/636,421 for the mark CRUSH for “ice cream, ices, chocolate, chocolate confectionery, chewing gum, biscuits, biscuit confectionery, and candy.” Registration was refused to Applicant on the grounds that Applicant’s mark was likely to cause confusion with the prior rights of Opposer’s predecessor in the CRUSH mark. Subsequently, Applicant amended the goods in its application to “biscuit sticks.”

10. As a matter of law, Applicant was on constructive notice of Opposer’s rights in the CRUSH Marks, based on Opposer’s federal trademark registrations for the same, at the time it filed the application herein opposed. Upon information and belief, as a result of Opposer’s and its predecessors’ extensive use of the CRUSH Marks for almost 90 years, Applicant was on actual notice of Opposer’s or its predecessors’ prior rights in and to the CRUSH Marks.

11. The filing date of the application, and the only date on which Applicant can rely, is decades after the use, registration and acquisition of rights in the CRUSH Marks by Opposer or its predecessors-in-interest. As such, Opposer’s rights in its CRUSH Marks are prior and superior to any rights Applicant may claim in the mark CRUSH.

12. The mark opposed incorporates in its entirety and is identical to Opposer’s CRUSH mark. As the Trademark Examiner noted in its initial refusal to register, where, as here, the marks are identical “the relationship between the goods or services of the respective parties need not be as close to support a finding of likelihood of confusion as might apply where differences exist between the marks.”

13. Applicant seeks to use the mark CRUSH in connection with “biscuit sticks.”

These food items of Applicant are related to the drink items and confectionery offered by Opposer or its predecessors under the CRUSH Marks. Since consumers are used to seeing a single entity make various kinds of foods, consumers are likely to be mistaken as to the source of Applicant’s goods which are to be sold under Opposer’s very marks. Moreover, given that Opposer’s CRUSH Marks have been used in connection with various flavored goods, consumers may believe that Applicant’s biscuits are flavored with Opposer’s products.

14. The application herein opposed is not limited with respect to channels of trade or consumers for goods to be sold under the mark CRUSH. Accordingly, as a matter of law biscuit sticks under the CRUSH mark will be deemed to be sold to all customers and through all channels of trade that are customary for such food products. These are the identical channels of trade and customers that are familiar with Opposer’s CRUSH Marks and through which Opposer or its licensees sell Opposer’s CRUSH-branded products.

15. Registration of Applicant’s mark is inconsistent with Opposer’s prior rights in its CRUSH Marks, is inconsistent with Opposer’s statutory grant of exclusivity of use of the registered CRUSH Marks, and would destroy Opposer’s investment and goodwill in its CRUSH Marks.

CLAIM FOR RELIEF UNDER SECTION 2(d)

16. Opposer repeats and re-alleges each and every allegation contained in paragraphs 1 through 15 as if fully set forth herein.

17. The CRUSH Marks are associated exclusively with Opposer and its predecessors-in-interest and have been used continuously and registered by Opposer or its predecessors since a date long prior to any date on which Applicant can rely.

18. Applicant's mark CRUSH is identical to Opposer's prior registered and prior used CRUSH Marks. Applicant seeks to use its mark in connection with goods related to those provided by Opposer under its CRUSH Marks, sold to the same or overlapping consumer base who uses or is familiar with Opposer's CRUSH-branded products, and sold through the same channels of trade used by Opposer.

19. By virtue of the use of the CRUSH Marks by Opposer, its predecessors and its licensees, the goodwill associated with Opposer's CRUSH Marks, the registrations owned by Opposer for the CRUSH Marks, the fame of the CRUSH Marks, the use of the CRUSH Marks on various food and beverage products, the registration by Applicant of CRUSH for the goods identified in Application S.N. 76/636,421 is likely to create the erroneous impression that Applicant's biscuits originate from, come from or are otherwise associated with Opposer or that Applicant's use of CRUSH for biscuits is licensed by, or its products are endorsed or in some way connected with Opposer. Registration of the mark CRUSH in connection with the goods set forth in Application S.N. 76/636,421 is likely to cause confusion, cause mistake, or to deceive the public into the belief that the products offered by Applicant under the mark CRUSH come from or are otherwise sponsored by Opposer in violation of Section 2(d) of the Lanham Act, 15 U.S.C. §1052(d).

20. By reason of the foregoing, Opposer is likely to be harmed by registration of Application S.N. 76/636,421 for the mark CRUSH.

WHEREFORE, it is respectfully requested that this opposition be sustained and that the registration sought by Applicant in Application S.N. 76/636,421 be denied.

Opposer authorizes the opposition fee in the amount of \$300.00 for one class to be debited from Opposer's attorneys' Deposit Account No. 23-0825-0576900.

Dated: New York, New York  
June 27, 2006

FROSS ZELNICK LEHRMAN  
& ZISSU, P.C.

By: 

Barbara A. Solomon  
866 United Nations Plaza  
New York, New York 10017  
(212) 813-5900

Attorneys for Opposer Dr Pepper/Seven Up, Inc.

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